



JUL 31 2015

MEMORANDUM FOR THE ACQUISITION WORKFORCE

FROM: JEFFREY A. KOSES   
SENIOR PROCUREMENT EXECUTIVE (MV)

SUBJECT: Class Deviation Addressing Commercial Supplier Agreement  
Terms that Conflict or Are Incompatible with Federal Law

1. **Purpose.** This letter notifies the Acquisition Workforce of a Class Deviation to address common Commercial Supplier Agreement Terms that conflict or are otherwise incompatible with Federal law.
2. **Background.** Commercial Supplier Agreement Terms (e.g. standard terms of sale or lease, Terms of Service (TOS), End User License Agreements (EULA), or other similar legal instruments or agreements) may be presented as part of a proposal or quotation response to a solicitation for a contract or order. These Commercial Supplier Agreement (CSA) Terms may include clauses that are acceptable to private parties, but are improper or illegal for acceptance by the Federal Government. These commonly recurring, conflicting or ambiguous clauses require GSA contracting activities to negotiate individual agreements to address the conflicts, often at significant cost to both the Agency and contractor.

GSA has identified fifteen (15) common elements of Commercial Supplier Agreement Terms that conflict with or are incompatible with Federal law that must be resolved to align with Federal law or Government requirements in order for a valid contract to be formed. The GSA Senior Procurement Executive has issued this Class Deviation to preemptively address those fifteen common areas of conflict and ambiguity, therefore obtaining the same contracting result while saving significant time and resources. For acquisitions governed by FAR Part 12, the GSA Senior Procurement Executive has also issued a class waiver under the authority of FAR 12.301(f). In accordance with FAR 12.302(c), the class waiver permits contracting officers to utilize procedures that differ from customary commercial practices to address the fifteen specified contract elements. Those fifteen areas are as follows:

- 1) Definition of contracting parties
- 2) Contract formation
- 3) Vendor indemnity (vendor assumes control of proceedings)
- 4) Automatic renewals of term-limited agreements
- 5) Future fees or penalties
- 6) Taxes

- 7) Payment terms or invoicing (late payment)
- 8) Automatic incorporation/deemed acceptance of third party terms
- 9) State/foreign law governed contracts
- 10) Equitable remedies, injunctions, binding arbitration
- 11) Unilateral termination of supplier agreement by supplier
- 12) Unilateral modification of supplier agreement by supplier
- 13) Assignment of supplier agreement or Government contract by supplier
- 14) Confidentiality of supplier agreement terms and conditions
- 15) Audits (automatic liability for payment)

Enacting this Class Deviation will protect GSA and contractors by uniformly addressing common unacceptable terms, immediately reducing risk, reducing administrative costs, and further streamlining the acquisition process for commercial-item supplies and services.

This Class Deviation addresses the order of precedence and the fifteen (15) specific contract elements identified above. Contracting Officers are still encouraged to review and negotiate other terms and unrelated terms and conditions to ensure that the ordering activity's business needs are met.

**3. Effective Date.**

Immediately.

**4. Expiration Date.**

This Acquisition Letter expires upon incorporation of the changes into the General Services Administration Acquisition Manual (GSAM) or Federal Acquisition Regulation (FAR).

**5. Applicability.**

This Class Deviation applies to all GSA acquisitions when the resultant contract is for items containing Commercial Supplier Agreements.

**6. Instructions.**

A Class Deviation has been granted from FAR Parts 2 and 52.

A new definition for Commercial Supplier Agreement has been created at GSAM 502.101. Members of the Acquisition Workforce should familiarize themselves with the new definition found in Attachment A.

Contracting Officers are instructed to incorporate the clauses included in Attachment A into all contracts, as follows:

**a. All new contracts that include items with Commercial Supplier Agreements:**

- i. Use GSAM 552.212-4 (Alternate II)(FAR Deviation)(July 2015) in lieu of FAR 52.212-4 (when prescribed for FAR Part 12 acquisitions by FAR 12.301(b)(3) for the acquisition of commercial items).
- ii. Use GSAM 552.232-39 (FAR Deviation)(July 2015) in lieu of FAR 52.232-39 (when prescribed by FAR 32.706-3).

- iii. Incorporate GSAM 552.232-78 into all contracts when not using FAR Part 12. GSAM 552.232-78 will be read into any contracts that do not incorporate the language, including acquisitions under the micro-purchase threshold.

**b. All Federal Supply Schedule (FSS) contracts that contemplate the award of items containing Commercial Supplier Agreements:**

A mass modification will be issued to ensure that all FSS contracts contain the three clauses described in the paragraph above, as appropriate.

**c. Existing Contracts:**

- i. Contracting officers shall modify any existing contracts to incorporate the three clauses described above whenever a modification is made or an option is exercised.
- ii. All Governmentwide Acquisition Contracts (GWAC) shall be modified to incorporate the three clauses described above as soon as practical.

**7. Point of Contact.**

If you have any questions concerning the topic of this Acquisition Letter, please contact Mr. James Tsujimoto of the General Services Acquisition Policy Division, james.tsujimoto@gsa.gov or (202) 208-3585.

**8. Questions and Answers.**

**Q1. Do Contracting Officers still need to negotiate out the 15 identified elements?**

A1. No, the new clauses ensure that any of the 15 elements identified in the class deviation are automatically unenforceable, even if included in a commercial supplier agreement. Therefore, contracting officers should not spend time negotiating these terms out of commercial supplier agreements.

**Q2. If this Class Deviation provides protection against inappropriate or illegal terms being incorporated into contracts, do Contracting Officers even need to review the CSA?**

A2. Absolutely. Contracting Officers should always thoroughly review CSAs (and all documents that are incorporated into any GSA contract). Contracting Officers may also see guidance from the Office of General Counsel if they are unsure about the legality of the terms in the agreement, if necessary. However, it is not required to obtain guidance from OGC to negotiate the 15 elements identified in the class deviation out of a CSA.

**Q3. Where can I obtain further information on how to implement this change within the Schedules program?**

A3. The Federal Acquisition Service (FAS) Office of Acquisition Management will issue training and further guidance to implement the deviation within the Schedules program.

## Attachment A

### **General Services Acquisition Regulation (GSAR) Class Deviation**

The baseline for this class deviation is GSAR Change 65, dated June 24, 2015. Changes from the baseline are shown by **[bold bracketed additions]** and ~~striketrough deletions~~. Five asterisks (\*\*\*\*\* ) indicate that there are no revisions between the preceding and following paragraphs, sections or clauses. Three asterisks (\*\*\*) indicate that there are no additional revisions between the material shown within a subparagraphs.

#### **PART 502—DEFINITIONS OF WORDS AND TERMS**

##### **502.101 Definitions.**

\*\*\*\*\*

**["Commercial supplier agreements" means terms and conditions customarily offered to the public by vendors of supplies or services that meet the definition of "commercial item" set forth in FAR 2.101 and intended to create a binding legal obligation on the end user. Commercial supplier agreements are particularly common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, but they may apply to any supply or service. The term applies –**

- (a) regardless of the format or style of the document. For example, a commercial supplier agreement may be styled as standard terms of sale or lease, Terms of Service (TOS), End User License Agreement (EULA), or another similar legal instrument or agreement, and may be presented as part of a proposal or quotation responding to a solicitation for a contract or order;**
- (b) regardless of the media or delivery mechanism used. For example, a commercial supplier agreement may be presented as one or more paper documents or may appear on a computer or other electronic device screen during a purchase, software installation, other product delivery, registration for a service, or another transaction.]**

\*\*\*\*\*

#### **PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

\*\*\*\*\*

##### **552.212-4 Contract Terms and Conditions—Commercial Items. (ALTERNATE II) (FAR DEVIATION) (July 2015)**

**As directed in AL-2015-03, when a commercial item contract (using FAR Part 12 procedures) is contemplated and the contract will include FAR 52.212-4, replace**



subparagraph (g)(2), paragraph (s), and paragraph (u) of the basic FAR clause; additionally, add paragraph (w).

[(g)

\* \* \*

(2) The due date for making invoice payments by the designated payment office is the later of the following two events:

(i) The 10<sup>th</sup> day after the designated billing office receives a proper invoice from the Contractor. If the designated billing office fails to annotate the invoice with the date of receipt at the time of receipt, the invoice payment due date shall be the 10<sup>th</sup> day after the date of the Contractor's invoice; provided the Contractor submitted a proper invoice and no disagreement exists over quantity, quality, or Contractor compliance with contract requirements.

(ii) The 10<sup>th</sup> day after Government acceptance of supplies delivered or services performed by the Contractor.]

\* \* \* \* \*

(s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

(1) The schedule of supplies/services.

(2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, Unauthorized Obligations[, and **Commercial Supplier Agreements – Unenforceable Clauses**] paragraphs of this clause,

(3) The clause at 52.212-5,

~~(4) Addenda to this solicitation or contract, including any license agreements for computer software.~~

~~(5) [(4)]~~ Solicitation provisions if this is a solicitation.

~~(6) [(5)]~~ Other paragraphs of this clause.

**[(6) Addenda to this solicitation or contract, including any license agreements for computer software.]**

(7) The Standard Form 1449.

(8) Other documents, exhibits, and attachments.

(9) The specification.

\* \* \* \* \*

(u) Unauthorized Obligations

(1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract is subject to any **[commercial supplier agreement (as defined in 502.101)]** ~~End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement,~~ that includes any **[language, provision, or]** clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(i) Any such **[language, provision, or]** clause is unenforceable against the Government.

(ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the **[commercial supplier agreement. If the commercial supplier agreement]** ~~EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement~~ is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.

(iii) Any such **[language, provision, or]** clause is deemed to be stricken from the **[commercial supplier agreement]**~~EULA, TOS, or similar legal instrument or agreement.~~

(2) Paragraph (u)(1) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

\* \* \* \* \*

**[(w) Commercial supplier agreements – unenforceable clauses]**

**When any supply or service acquired under this contract is subject to a commercial supplier agreement (as defined in 502.101), the following language shall be deemed incorporated into the commercial supplier agreement. As used herein, "this agreement" means the commercial supplier agreement:**

**(1) Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the U.S. Government, the following shall apply:**

**(i) *Applicability.*** This agreement is a part of a contract between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license (including all contracts, task orders, and delivery orders under FAR Part 12).

**(ii) *End user.*** This agreement shall bind the ordering activity as end user but shall not operate to bind a Government employee or person acting on behalf of the Government in his or her personal capacity.

**(iii) *Law and disputes.*** This agreement is governed by Federal law.

**(A) Any language purporting to subject the U.S. Government to the laws of a U.S. state, U.S. territory, district, or municipality, or a foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted.**

**(B) Any language requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted.**

**(C) Any language prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.**

**(iv) *Continued performance.* If the supplier or licensor believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Contract Disputes Act or other applicable Federal statute while continuing performance as set forth in subparagraph (d) (Disputes).**

**(v) *Arbitration; equitable or injunctive relief.* In the event of a claim or dispute arising under or relating to this agreement, (A) binding arbitration shall not be used unless specifically authorized by agency guidance, and (B) equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the U.S. Government only when explicitly provided by statute (e.g., Prompt Payment Act or Equal Access to Justice Act).**

**(vi) Additional terms.**

**(A) This commercial supplier agreement may unilaterally incorporate additional terms by reference. Terms may be included by reference using electronic means (e.g., via web links, click and accept, etc). Such terms shall be enforceable only to the extent that:**

**(1) When included by reference using electronic means, the terms are readily available at referenced locations; and**

**(2) Terms do not materially change government obligations; and**

**(3) Terms do not increase government prices; and**

**(4) Terms do not decrease overall level of service; and**

**(5) Terms do not limit any other Government rights addressed elsewhere in this contract.**

**(B) The order of precedence clause of this contract notwithstanding, any software license terms unilaterally revised subsequent to award that is inconsistent with any material term or provision of this contract is not enforceable against the government.**

**(vii) No automatic renewals.** If any license or service tied to periodic payment is provided under this agreement (e.g., annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express Government approval.

**(viii) Indemnification.** Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.

**(ix) Audits.** Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows: (A) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the ordering activity. Any resulting invoice must comply with the proper invoicing requirements specified in the underlying Government contract or order. (B) This charge, if disputed by the ordering activity, will be resolved through the Disputes clause at 522.212-4(d); no payment obligation shall arise on the part of the ordering activity until the conclusion of the dispute process. (C) Any audit requested by the contractor will be performed at the contractor's expense, without reimbursement by the Government.

**(x) Taxes or surcharges.** Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the Government as end user will be governed by the terms of the underlying Government contract or order and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.

**(xi) Non-assignment.** This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under subparagraph (b) of this clause at 552.212-4.

**(xii) Confidential information.** If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the Federal Supply Schedule price list (if applicable) shall be deemed "confidential information." Issues regarding release of "unit pricing" will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance purposes; provided, however, that all such

**retained confidential information will continue to be subject to the confidentiality obligations of this agreement.**

**(2) If any language, provision, or clause of this agreement conflicts or is inconsistent with the preceding paragraph (w)(1), the language, provisions, or clause of paragraph (w)(1) shall prevail to the extent of such inconsistency.]**

End of Clause

\*\*\*\*\*

**[552.232-39 Unenforceability of Unauthorized Obligations. (FAR Deviation)(July 2015)**

**As directed in AL-2015-03, insert the following clause in lieu of FAR clause 52.232-39:]**

**552.232-39 Unenforceability of Unauthorized Obligations. (FAR Deviation)(July 2015)**

(a) Except as stated in paragraph (b) of this clause, when any supply or service acquired under this contract is subject to any **[commercial supplier agreement (as defined in 502.101)]** ~~End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement,~~ that includes any **[language, provision, or]** clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(1) Any such **[language, provision, or]** clause is unenforceable against the Government.

(2) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the **[commercial supplier agreement. If the commercial supplier agreement]** ~~EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement~~ is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.

(3) Any such **[language, provision, or]** clause is deemed to be stricken from the **[commercial supplier agreement]** ~~EULA, TOS, or similar legal instrument or agreement.~~

(b) Paragraph (a) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

End of Clause

\*\*\*\*\*



**[552.232-78 Commercial Supplier Agreements – Unenforceable Clauses.**

**As directed in AL-2015-03, insert the following clause into all contracts for the acquisition when not using part 12:**

**Commercial Supplier Agreements – Unenforceable Clauses ([July 2015])**

**(a) When any supply or service acquired under this contract is subject to a commercial supplier agreement, the following language shall be deemed incorporated into the commercial supplier agreement. As used herein, “this agreement” means the commercial supplier agreement:**

**(1) Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the U.S. Government, the following shall apply:**

**(i) *Applicability.*** This agreement is part of a contract between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license (including all contracts, task orders, and delivery orders not using FAR Part 12).

**(ii) *End user.*** This agreement shall bind the ordering activity as end user but shall not operate to bind a Government employee or person acting on behalf of the Government in his or her personal capacity.

**(iii) *Law and disputes.*** This agreement is governed by Federal law. (A) Any language purporting to subject the U.S. Government to the laws of a U.S. state, U.S. territory, district, or municipality, or foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted. (B) Any language requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted. (C) Any language prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.

**(iv) *Continued performance.*** If the supplier or licensor believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Contract Disputes Act or other applicable Federal statute while continuing performance as set forth in 52.233-1 Disputes.

**(v) *Arbitration; equitable or injunctive relief.*** In the event of a claim or dispute arising under or relating to this agreement, (A) binding arbitration shall not be used unless specifically authorized by agency guidance, and (B) equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the U.S. Government only when explicitly provided by statute (e.g., Prompt Payment Act or Equal Access to Justice Act).

**(vi) Additional terms.**

**(A) This commercial supplier agreement may unilaterally incorporate additional terms by reference. Terms may be included by reference using electronic means (e.g., via web links, click and accept, etc). Such terms shall be enforceable only to the extent that:**

**(1) When included by reference using electronic means, the terms are readily available at referenced locations; and**

**(2) Terms do not materially change government obligations; and**

**(3) Terms do not increase government prices; and**

**(4) Terms do not decrease overall level of service; and**

**(5) Terms do not limit any other Government right addressed elsewhere in this contract.**

**(B) The order of precedence clause of this contract notwithstanding, any software license terms unilaterally revised subsequent to award that is inconsistent with any material term or provision of this contract is not enforceable against the government.**

**(vii) *No automatic renewals.* If any license or service tied to periodic payment is provided under this agreement (e.g., annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express Government approval.**

**(viii) *Indemnification.* Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.**

**(ix) *Audits.* Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows: (A) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the ordering activity. Any resulting invoice must comply with the proper invoicing requirements specified in the underlying Government contract or order. (B) This charge, if disputed by the ordering activity, will be resolved through the Disputes clause at 52.233-1; no payment obligation shall arise on the part of the ordering activity until the conclusion of the dispute**

process. (C) Any audit requested by the contractor will be performed at the contractor's expense, without reimbursement by the Government.

(x) *Taxes or surcharges.* Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the Government as end user will be governed by the terms of the underlying Government contract or order and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.

(xi) *Non-assignment.* This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under the clause at 52.232-23, Assignment of Claims.

(xii) *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the Federal Supply Schedule price list shall be deemed "confidential information." Issues regarding release of "unit pricing" will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this agreement.

(2) If any provision of this agreement conflicts or is inconsistent with the preceding subparagraph (a)(1), the provisions of subparagraph (a)(1) shall prevail to the extent of such inconsistency.]

End of Clause





**Determination and Findings  
Class Waiver Request  
Tailoring Inconsistent with Customary Commercial Practice – FAR 12.302(c)**

**A. Agency and Activity**

Federal Acquisition Services (FAS)  
Office of Acquisition Management

**B. Nature and/or description of the action being approve**

FAS requests a class waiver in accordance with Federal Acquisition Regulation (FAR) 12.302(c) to deviate from commonly used commercial supplier agreement terms and conditions that conflict with Federal law when they are incorporated into government contracts.

**C. Background**

FAS awards contracts for vast amounts of supplies and services that meet the definition of commercial item as prescribed in FAR 2.101, including computer software and other information technology (IT) supplies and services. Customarily, commercial item supplies and services are offered to the public under standard, template agreements that may take a variety of forms, including license agreements, terms of service (TOS), terms of sale or purchase, and similar agreements. These customary, standard commercial supplier agreements typically contain terms and conditions that are lawful when the purchaser is a private party but inappropriate when the purchaser is the Federal Government and the agreement is incorporated into a Government contract. Inconsistencies between commercial supplier agreements and Federal law or the Government's needs create recurrent points of failure in Federal contracts that place agencies at risk of violating anti-deficiency laws, provide for dispute resolution mechanisms not authorized by statute, or are otherwise inappropriate.

**D. Findings**

The use of commercial supplier agreements has become ubiquitous in a broad variety of contexts, from travel to telecommunications to financial services to building maintenance systems, including purchases below the simplified acquisition threshold. As a result of the risk associated with the conflicting terms of standard commercial agreements, FAS' IT Schedule 70 - contracting officers are not permitted to award contracts or modifications involving products or services with commercial license agreements, TOS, terms of sale or purchase, and similar agreements without first engaging GSA legal counsel to determine whether inconsistent terms and conditions need to be removed or modified. When appropriate, legal counsel works with Schedule 70 contracting officers to negotiate federally-compatible supplemental<sup>1</sup> agreements with

---

<sup>1</sup> The term "supplemental" refers to any change to standard commercial agreements /TOS agreed to by both parties.



vendors. This arduous process increases acquisition lead times, reduces competition, and puts a strain on GSA's limited resources. When reviewing offers to IT Schedule 70, contracting officers and legal counsel identified fifteen points of inconsistency that present themselves when unlawful commercial supplier agreements, TOS, terms of sale or purchase, and similar agreements are incorporated into government contracts. The points of failure are provided below with a summary of how they will be addressed via a class deviation:

1. *Definition of contracting parties*: Contract agreements are between the commercial supplier or licensor and the U.S. Government. Government employees or persons acting on behalf of the Government will not be bound in their personal capacity by the Commercial Supplier Agreement.

2. *Contract formation*: Commercial Supplier Agreements may be integrated into a contract, so long as the terms are included verbatim and are not incorporated by reference. The terms of the deviated clause and other identified elements will supersede any conflict with the Commercial Supplier Agreement. This order of precedence will allow for the incorporation of Commercial Supplier Agreements, with certain clauses being stricken as unenforceable, without the need to individually negotiate agreements. "Click-wrap", "Browse-wrap" and other such mechanisms that purport to bind the end-user will not bind the Government or any Government authorized end-user.

3. *Patent indemnity (contractor assumes control of proceedings)*: Any clause requiring that the commercial supplier or licensor control any litigation arising from the government's use of the contractor's supplies or services is deleted. Such representation when the Government is a party is reserved by statute for the U.S. Department of Justice.

4. *Automatic renewals of term-limited agreements*: Due to Anti-Deficiency Act restrictions, automatic contract renewal clauses are impermissible. Any such Commercial Supplier Agreement clauses are unenforceable.

5. *Future fees or penalties*: Future fees—such as attorney fees, cost or interest—may only be awarded against the U.S. Government when expressly authorized by statute (e.g. Prompt Payment Act).

6. *Taxes*: Any taxes or surcharges that will be passed along to the Government will be governed by the terms of the underlying contract. The cognizant contracting officer must make a determination of applicability whenever such a request is made.

7. *Payment terms or invoicing (late payment)*: Any Commercial Supplier Agreement terms that purport to establish payment terms or invoicing requirements that contradict the terms of the Government contract will be unenforceable. Discrepancies found during an audit must comply with the invoicing procedures from the underlying contract.

8. *Automatic incorporation/deemed acceptance of third party terms:* No third party terms may be incorporated into the contract by reference. Incorporation of third party terms after the time of award may only be performed by bilateral contract modification with the approval of the cognizant contracting officer.

9. *State/foreign law governed contracts:* Clauses that conflict with the sovereign immunity of the U.S. Government cannot apply to litigation where the U.S. Government is a defendant because those disputes must be heard either in U.S. District Court or the U.S. Court of Federal Claims. Commercial Supplier Agreement terms that require the resolution of a dispute in a forum other than that expressly authorized by Federal law are deleted. Statutes of limitation on potential claims shall be governed by U.S. Government law.

10. *Equitable remedies, injunctions, binding arbitration:* Equitable remedies, injunctive relief and binding arbitration clauses may not be enforced unless explicitly authorized by agency guidance or statute.

11. *Unilateral termination of Commercial Supplier Agreement by supplier:* Commercial suppliers may not unilaterally terminate or suspend a contract unless the supplies or services are generally withdrawn from the commercial market. Remedy from contractual breach by the Government must be pursued under the Contract Disputes Act.

12. *Unilateral modification of Commercial Supplier Agreement by supplier:* Unilateral changes of the Commercial Supplier Agreement are impermissible and any clause authorizing such changes is unenforceable.

13. *Assignment of Commercial Supplier Agreement or Government contract by supplier:* The contract, Commercial Supplier Agreement, party rights and party obligations may not be assigned or delegated without express Government approval. Payment to a third party financial institution may still be reassigned.

14. *Confidentiality of Commercial Supplier Agreement terms and conditions:* The content of the Commercial Supplier Agreement and the final contract pricing may not be deemed confidential. The Government may retain other marked confidential information as required by law, regulation or agency guidance, but will appropriately guard such confidential information.

15. *Audits (automatic liability for payment):* Discrepancies found during an audit must comply with the invoicing procedures from the underlying contract. Disputed charges must be resolved through the Disputes clause. Any audits requested by the commercial supplier or licensor will be performed at supplier or licensor's expense.

**E. Determination**

It is my determination that the commercial terms and conditions outlined in Section D are inconsistent with the needs of the Government. As a result, it is in the Government best interest to waive these commercial practices because they place agencies at risk of violating anti-deficiency laws, provide for dispute resolution mechanisms not authorized by statute, or are otherwise inappropriate. The ongoing negotiations conducted by the IT Schedule 70 contracting officers requires the expenditure of unnecessarily long acquisition lead times and increased administrative costs when the outcome of any negotiations related to the 15 points of failure are predetermined by law, policy or other controlling guidance.

  
\_\_\_\_\_  
Jeffrey Koses  
Senior Procurement Executive  
General Services Administration

July 31, 2015  
Date